PUBLIC BANK BHD.

v.

MALAMAJU ENTERPRISE SDN. BHD. & ORS.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 1504 OF 1985]
11 FEBRUARY 1989

CIVIL PROCEDURE: *Judgment in default of appearance set aside - Service by substituted service irregular - Final judgment in respect of defendant who raised triable issue set aside.*

The plaintiff had given overdraft facilities to the 1st defendant which was a company. The 5th and 6th defendants were directors of the said company when they gave a guarantee for the overdraft facilities but they resigned subsequently. Final judgment was entered by the Senior Assistant Registrar against the 2nd, 4th and 6th defendants. The 4th and 6th defendants appealed. Judgment in default of appearance was entered against the 5th defendant. She applied to set it aside.

Held:

[1] The judgment in default of appearance which was entered against the 5th defendant was irregular as she was not residing at the premises where substituted service was effected. There was a triable issue as to whether the 5th defendant was liable under the guarantee agreement as she had resigned as a director of the 1st defendant.

[2] The final judgment against the 4th defendant was set aside as there was a triable issue as to whether he was still liable under the guarantee agreement after he had resigned as a director of the 1st defendant.

[3] The final judgment against the 6th defendant was upheld as there was no triable issue.

For the appellant/plaintiff - Ng; M/s. Henry Lim & Co.
For the respondent/1st defendant - Asbir; M/s. Asbir, Hira Singh & Co.

JUDGMENT

Abdul Malek Ahmad J:

The 5th defendant had applied by summons-in-chambers (encl. 25) filed on 27 August 1987 to set aside with costs the service of the writ of summons and the judgment in default of appearance entered against her in this suit on 30 March 1987. At the same hearing, the 4th and 6th defendants had filed a notice of appeal (encl. 35) against the decision of the learned Senior Assistant Registrar on 8 June 1988 ordering final judgment against them for RM276,224.03 sen being the outstanding balance of the overdraft account of the 1st defendant as at 30 September 1987 together with interest at 16.75% per annum with monthly rests on the overdraft within the operative limit of RM150,000 and at 17.25% per annum with monthly rests on the excess overdraft, which is subject to fluctuations at the plaintiff's discretion, from 1 October 1987 to the date of satisfaction and for RM158,801.31 sen being the outstanding balance of the trust receipt of the 1st defendant as at 30 September 1987 together with interest thereon at 17% per annum, which is subject to fluctuations at the plaintiff's discretion, and costs.

The grounds for the 5th defendant's application were that she never had notice of the writ of summons as she had moved out of the premises on which substituted service had been effected on 21 February 1987, and to support this ground she had produced a copy of the change of address card dated 23 July 1985 issued by the Registration Department; that the endorsement by the process server on the affidavit of service (encl. 20) was incorrect as he appeared to be at two different places at the same time, that Exhibit "PBB2" at encl. 9 in mid-April 1986 had addressed the 5th defendant as a man and not as a woman which she is and in any case it was marked "unknown" by the Postal Department; and that Exhibit "PBB5" at the same enclosure was an affidavit of non service affirmed on 5 May 1986. On these facts, learned Counsel for the 5th defendant argued that the judgment was irregular.

Counsel then referred to the proposed statement of defence by the 5th defendant at Exhibit "HSK1" at encl. 24 where it had been stated that she had resigned as director on 20 September 1983 and that she and the 4th and 6th defendants had been absolved from their guarantee from that date pursuant to the 1st defendant's circular resolution dated 23 September 1983, a copy of which had been sent to and agreed to by the plaintiff as at Exhibit "CKL2" at encl. 28. As such, Counsel contended that Clause 6 of the guarantee at Exhibit "CKL1" of the enclosure was sufficient notice to the plaintiff. Furthermore, Counsel submitted that the 5th defendant did not speak English.

Since the substituted service on the 5th defendant was effected on 21 February 1987 in the light of the evidence that she had moved on 23 July 1985, the Court agrees with her Counsel that judgment in default of appearance entered against her was irregular. On the merits, the 5th defendant had referred to the 1st defendant's company resolution stating that she and the 4th defendant had resigned as directors of the company with effect from 20 September 1983 and that they were free from all liabilities, disputes and any encumbrances whatsoever as they had no further connections in any of the company's activities from that date.

On this point, Counsel for the plaintiff argued that the 5th defendant had never been discharged by the plaintiff as no formal discharge had been executed by them to that effect. He, however, agreed that this requirement was not stated in the letter of guarantee. In any case, he submitted that since the 5th defendant had signed the letter of guarantee in her personal capacity, her ceasing to be a director of 1st defendant did not terminate her liability. I was of the view that this constituted a triable issue in the circumstances and had the effect of strengthening the 5th defendant's application to set aside the judgment in default of appearance. Assuming I was in error, the irregular service on her alone was sufficient to set aside the judgment in default of appearance with costs.

Concerning the appeal by the 4th and 6th defendants, the plaintiff had applied for final judgment against the 2nd, 4th and 6th defendants by way of summons-in-chambers filed on 6 November 1987. The 4th and 6th defendants had in fact filed their joint statement of defence on 28 July 1986 and there had been no explanation from the plaintiff as to the 16-month delay in filing their application except for para. 11 in encl. 33 where the plaintiff averred on the time taken for foreclosure proceedings. On the unexplained delay alone, the Court had the power to set aside the order for final judgment if it thought it fit.

The 4th and 6th defendants, in addition, stated the same grounds as the 5th defendant as to the fact that they had ceased to be directors and had been discharged from the letter of guarantee. As for the 4th defendant, the Court held that as in the case of the 5th defendant, he had raised triable issues on the merits apart from the fact that the delay in the application for the summary judgment had not been explained satisfactorily. I accordingly allowed his appeal with costs. However, the same could not be said for the 6th defendant as his name does not appear in that particular company resolution and despite the fact that the application for summary judgment was filed 16 months after his statement of defence, the Court was of the view that he had not raised any triable issues and in the event dismissed his appeal with costs.

Also found at [1989] 1 CLJ 1108